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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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8 MARIO H. RIVAS PINEDA,

9 CASE NO. C10-390-RAJ-JPD

10 Petitioner,

11 v.

12 A. NEIL CLARK, Field Office Director, U.S.
13 Immigration and Customs Enforcement, *et al.*,

14 Respondents.

REPORT AND
RECOMMENDATION

15 I. INTRODUCTION AND SUMMARY CONCLUSION

16 Petitioner Mario H. Rivas Pineda, proceeding through counsel, has filed a Petition for
17 Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, which seeks to “prevent his unlawful
18 removal” from the United States, and “to provide him with a meaningful review of his
19 immigration case.” (Dkt. No. 4.) Petitioner alleges that he “never has had the opportunity for
20 his day in court and has never been represented by counsel.” *Id* at 3. He asserts that he was
21 ordered removed *in absentia*, but did not receive notice of his removal proceedings until fifteen
22 days after his hearing date. *Id.* Respondents have filed a response arguing that the Court lacks
23 jurisdiction to consider petitioner’s habeas petition and request for stay under the REAL ID Act
24 of 2005, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005). (Dkt. No. 6.)

1 For the reasons set forth below, the Court recommends that petitioner's request for stay
 2 of removal be DENIED, and that this matter be DISMISSED with prejudice.
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II. BACKGROUND AND PROCEDURAL HISTORY

4 Petitioner is a native and citizen of El Salvador who entered the United States without
 5 inspection on or about April 15, 1994. (Administrative Record "AR" at A2, A7.) On May 3,
 6 1994, he applied for asylum by filing a Request for Asylum in the United States with the former
 7 Immigration and Naturalization Service ("INS").¹ (AR A217-21.) On August 31, 1998, the INS
 8 found petitioner's claim not credible and referred his case to an Immigration Judge ("IJ").
 9 (A226-30.) Petitioner was personally served with a Notice to Appear, placing him in removal
 10 proceedings and charging him as subject to removal under Section 212(a)(6)(A)(i) of the
 11 Immigration and Nationality Act ("INA"), for being present in the United States without being
 12 admitted or paroled. (AR A231-32.)

13 On January 13, 1999, petitioner appeared for a master calendar hearing and was
 14 represented by pro bono counsel who requested a continuance to allow petitioner to seek legal
 15 counsel to represent him at his next scheduled hearing. (AR A248.) Petitioner was personally
 16 served with a Notice of Hearing in Removal Proceedings, indicating that his next master
 17 calendar hearing was scheduled for June 2, 1999, at 1:00 p.m. (AR A234.) On June 2, 1999,
 18 however, petitioner failed to appear at his scheduled hearing and the IJ ordered him removed *in
 19 absentia*. (AR L5.) On June 10, 1999, petitioner filed a motion to reopen with the IJ, arguing
 20 that he "was not advised of any future interview before the service," and "did not receive any
 21 notice advising [him] of any interview before your service." (AR A237-38.) On June 22, 1999,
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23 ¹ Effective March 1, 2003, the Immigration and Naturalization Service was abolished
 24 pursuant to the Homeland Security Act of 2002, 116 Stat. 2135, Pub. L. 107-296, *codified at* 6
 25 U.S.C. §§ 101, *et seq.*, and its immigration functions were transferred to the Department of
 26 Homeland Security ("DHS").

1 the IJ denied petitioner's motion to reopen, noting that petitioner had personally appeared with
2 pro bono counsel on January 13, 1999, and was personally served with a hearing notice for June
3 2, 1999. (AR A248-49.) On July 26, 1999, petitioner filed an appeal of the IJ's decision with
4 the Board of Immigration Appeals ("BIA"), which denied the appeal as untimely on August 31,
5 1999. (AR L9.) Petitioner did not appeal the BIA's decision.

6 On March 4, 2010, petitioner was arrested at his place of employment and taken into ICE
7 custody. (AR R20-22.) On March 9, 2010, petitioner, proceeding through counsel, filed the
8 instant habeas petition along with an emergency request for a stay of removal, indicating that his
9 removal to El Salvador was imminent. (Dkt. No. 1.) Accordingly, the Court issued an Order
10 granting a temporary stay of removal and ordering respondents to file a response to petitioner's
11 request for stay within fifteen days. (Dkt. No. 3.) On March 25, 2010, respondents filed a
12 response to petitioner's request for stay of removal, along with a certified copy of the
13 Administrative Record. (Dkt. Nos. 6 and 7.)

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III. DISCUSSION

15 Petitioner argues, or at least asserts, that the IJ violated his due process rights by failing to
16 advise him of the date of his immigration hearing or of his right to retain counsel in removal
17 proceedings. (Dkt. No. 4 at 3-5.) Petitioner also asserts that he may be eligible to adjust his
18 status based on his United States citizen child. *Id.* at 3. He asks this Court to "[e]nter an
19 EMERGENCY STAY and enjoin Respondents from effecting the deportation of Petitioner," and
20 "[o]rder that Respondents join in Petitioner's efforts to reopen the removal proceedings on the
21 basis of his application for adjustment of status to permanent residence . . ." (Dkt. 4 at 5.)
22 Respondents respond that the Court lacks jurisdiction to grant such relief under the REAL ID
23 Act. (Dkt. No. 6.) The Court agrees with respondents that it lacks jurisdiction.
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1 The REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (May 11, 2005),
2 amended the judicial review provisions of the Immigration and Nationality Act to explicitly
3 provide that judicial review of all deportation, exclusion, or removal orders lies exclusively in
4 the appropriate court of appeals, and that the district courts no longer have jurisdiction to review
5 such orders. This statutory provision provides, in part, that the exclusive means of asserting a
6 challenge to a final order of removal and matters dependent thereon, is to file a Petition for
7 Review with the appropriate court of appeals. *See* 8 U.S.C. § 1252(a)(5) (“A petition for review
8 filed with an appropriate court of appeals in accordance with this section shall be the sole and
9 exclusive means for judicial review of an order of removal entered or issued under any provision
10 of this chapter”); *Iasu v. Smith*, 511 F.3d 881, 888 (9th Cir. 2007) (“After the REAL ID Act . . .
11 the district court plainly lacked habeas jurisdiction”); *see also* 8 U.S.C. § 1252(g) (“Except as
12 provided in this section and notwithstanding any other provision of law, no court shall have
13 jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or
14 action by the Attorney General to commence proceedings, adjudicate cases, or execute removal
15 orders against any alien under this chapter.”). Pursuant to the REAL ID Act, constitutional
16 claims or questions of law, that were historically reviewed under habeas corpus, now require
17 review in the circuit courts of appeal. *See* 8 U.S.C. § 1252(a)(2)(d); *see Fernandez-Ruiz v.*
18 *Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005), *adopted by* 466 F.3d 1121, 1124 (9th Cir. 2006)(en
19 banc).
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21 Here, the petition asserts due process violations of petitioner’s rights under United States
22 laws and the Constitution. *Id.* Notwithstanding the fact that petitioner’s due process allegations
23 are *not* supported by the Administrative Record, the Court plainly lacks jurisdiction to correct
24 such errors under the REAL ID Act. Because this Court lacks jurisdiction to consider
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1 petitioner's petition, it is similarly without jurisdiction to issue a stay of removal. The Circuit
2 Court is the proper forum for such claims and, thus for any injunctive relief associated with such
3 claims. The fact that petitioner was denied relief by the Immigration Court does not alter the fact
4 that this Court lacks jurisdiction to entertain petitioner's petition and request for a stay of
5 removal.

6 IV. CONCLUSION

7 For the foregoing reasons, the Court recommends that petitioner's habeas petition be
8 DISMISSED with prejudice, petitioner's request for stay of removal be DENIED, and the
9 previous temporary stay of removal issued by the Court be VACATED. A proposed order
10 accompanies this Report and Recommendation.

12 DATED this 31st day of March, 2010.

13 
14 JAMES P. DONOHUE

15 United States Magistrate Judge